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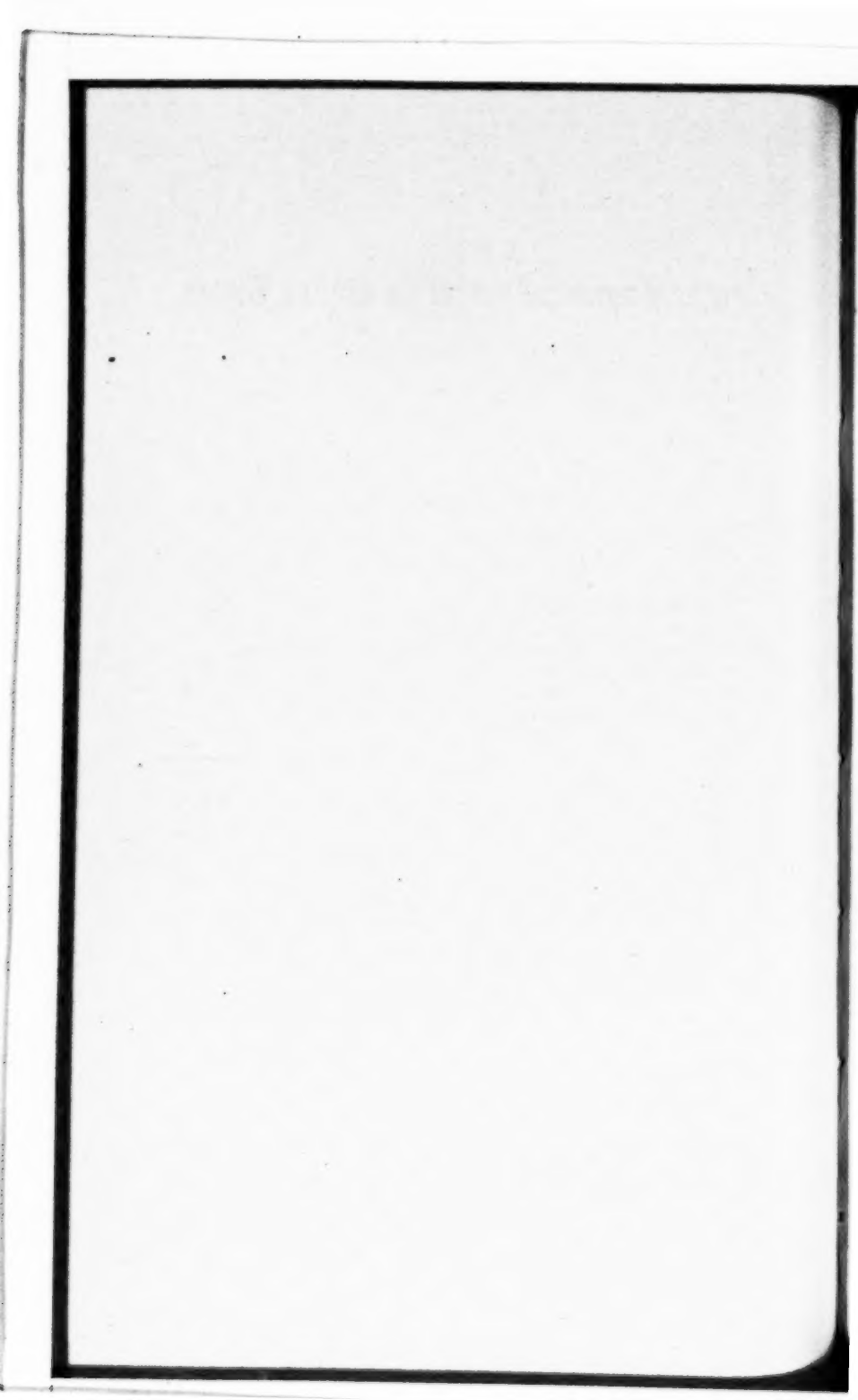
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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 617

ESTATE OF WALTER C. BURR, DECEASED, JEROME P.
BURR AND CLINTON S. BURR, EXECUTORS, PETI-
TIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 31-34) is unreported. The opinion of the Circuit Court of Appeals (R. 80-83) is reported in 156 F. 2d 871.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 17, 1946. (R. 83.) The petition for a writ of certiorari was filed on October 16, 1946. The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1934 the decedent purchased three single premium "life insurance" contracts in conjunction with an "annuity" contract. The insurance contracts would not have been issued without the annuity. Almost immediately thereafter the decedent assigned the insurance contracts to his three sons, but retained the annuity. The decedent died in 1940. Are the proceeds of the insurance contracts includible in his gross estate under Section 811 (c) of the Internal Revenue Code?

STATUTE AND REGULATION INVOLVED

The statute and regulation involved are set out in the Appendix, *infra*, pp. 10-12.

STATEMENT

The Tax Court found the following facts (R. 32-33):

Taxpayer is the Estate of Walter C. Burr, who died testate on April 3, 1940, at the age of eighty years, six months and twenty-five days. The estate tax return was filed with the Collector of Internal Revenue for the First District of New York. (R. 32.)

On December 7, 1934, decedent executed three single premium life insurance contracts with The

Prudential Insurance Company of America. The face amount and the premiums of the several policies were as follows (R. 32):

<i>Face amount</i>	<i>Single premium</i>
\$33,334-----	\$29,959.98
\$33,333-----	29,959.03
\$33,333-----	29,959.03

In conjunction with the purchase of the insurance policies decedent purchased an annuity contract in the face amount of \$2,444.52 on December 10, 1934, at a cost of \$17,622.01, under which decedent was entitled to monthly payments of \$203.71. The insurance contracts would not have been issued without the annuity contract, but the annuity contract would have been issued without the insurance contracts. Each of the insurance contracts contained the usual loan, assignment and cash surrender provisions, and was issued without medical examination. Decedent's three sons, Clinton, Jerome, and Winthrop, were beneficiaries under the insurance contracts. (R. 32.)

On December 20, 1934, decedent executed and delivered an assignment of each of the three insurance policies to his three sons. In July 1936, decedent executed and delivered assignments of all dividend rights accruing under the insurance contracts to his three sons. The form of the several assignments was absolute and irrevocable and, after the assignments of 1936, decedent re-

tained no rights under the insurance contracts. (R. 33.)¹

At the time of the issuance of the insurance contracts and the assignments thereof decedent was in reasonably good health for a man of his age. He was active in business matters and enjoyed frequent motoring trips and walks. He had no serious ailments. He employed a nurse continually, who acted mainly as a companion to him. He was careful about his diet, principally because of his obesity. He was afflicted with mild diabetes and had been taking insulin, but the insulin treatments were discontinued entirely in the summer of 1934. As part of a plan to take care of himself and live as long as he could, he had frequent physical examinations. His death in April 1940 was caused by acute uremia, due to prostatic obstruction. He had anticipated living many more years and had made plans for his vacation the following summer. Were it not for the development of the prostatic condition, decedent might have lived several more years. (R. 33.)

The Tax Court sustained the determination of the Commissioner that the proceeds of the insurance policies are includible in the decedent's gross estate. (R. 11, 34.) The court below affirmed. (R. 83.)

¹ We believe that this finding is inaccurate because there was a possibility of reverter to the decedent or his estate, but this consideration is not material here in view of the basis upon which the case was decided.

ARGUMENT

Both of the courts below, following *Estate of Reynolds v. Commissioner*, 45 B. T. A. 44, held, correctly we submit, that the proceeds of the insurance policies are includible in the decedent's gross estate under Section 811 (c) of the Internal Revenue Code, Appendix, *infra*, which provides specifically for the inclusion in the grantor's gross estate of property, donatively transferred, by trust or otherwise, where he has retained for his life, or for any period not ascertainable without reference to his death, or for any period which does not in fact end before his death, the possession or enjoyment of, or the right to the income from, the property.²

The instant situation is plainly within the scope of this Court's decision in *Helvering v. Le Gierse*, 312 U. S. 531, where it was held that a life insurance policy and an annuity policy issued at the same time should be considered together to determine whether there was any real insurance risk, and that so considered there was no such risk. The rationale of the decision in the *Le Gierse* case is that a transaction like the one in-

² These specific provisions came into the law by amendments passed in 1931 and 1932. While they are not retroactively applicable to transfers made prior to their enactment (*Hassett v. Welch*, 303 U. S. 303), they are valid as to subsequent transfers (*Helvering v. Bullard*, 303 U. S. 297). Since the instant contracts were made in 1934, they are subject to the amendments.

volved in cases of this sort is in essence an investment by which the settlor secures a low rate of return in the nature of income for life, together with the undertaking of the insurance company to transfer the proceeds to the objects of his bounty at or after his death. Such an arrangement is comparable in effect to a transfer in trust with a life interest reserved to the grantor. See also *Commissioner v. Clise*, 122 F. 2d 998 (C. C. A. 9th), certiorari denied, 315 U. S. 821; *Mearkle's Estate v. Commissioner*, 129 F. 2d 386 (C. C. A. 3d); *Commissioner v. Wilder's Estate*, 118 F. 2d 281 (C. C. A. 5th), certiorari denied, 314 U. S. 634; *Peek v. United States*, 38 F. Supp. 826 (E. D. Pa.); 1 Paul, Federal Estate and Gift Taxation, Secs. 7.18, 10.08, pp. 352, 498-500.

It is true that the decedent in the instant case assigned the insurance policies to his three sons, but even assuming, *arguendo*, that they became the absolute owners, that would not change the result, for the decedent retained the annuity and that is enough to sustain the tax under the specific provisions of Section 811 (c) above referred to.

The taxpayers urge (Pet. 6, 14-15) that the instant decision and the *Reynolds* case are contrary to *Legg v. St. John*, 296 U. S. 489; *Commissioner v. Meyer*, 139 F. 2d 256 (C. C. A. 6th); *Helvering v. Meredith*, 140 F. 2d 973 (C. C. A. 8th); and *Tonkin v. United States*, 56 F. Supp. 817 (W. D.

Pa.). But we submit that all of those cases are distinguishable. Indeed, *Legg v. St. John* was expressly distinguished by this Court in the *Le Gierse* case (p. 541) on the ground that in the *Legg* case nothing indicated that the one contract would not have been issued without the other; there was no necessary connection between the two. The *Meredith* and *Meyer* cases are income tax cases, and irrespective of whether they may be considered correct it seems clear, as pointed out by the court in the *Meyer* case (p. 258), that the dissimilarity between the object and purposes of the estate tax and the income tax is such that decisions as to one of these taxes are not necessarily controlling with respect to the other. And see *Estate of Sanford v. Commissioner*, 308 U. S. 39, 47-48. The decision of the District Court in the *Tonkin* case, upon which taxpayers rely, was reversed upon appeal, *United States v. Tonkin*, 150 F. 2d 531 (C. C. A. 3d), certiorari denied, 326 U. S. 771, and the tax was upheld.

The taxpayers say (Pet. 15-16) that the sons to whom the insurance contracts were assigned in the instant case could have surrendered them for cash, and that the intimation in the opinion of the Circuit Court of Appeals (R. 82) that such surrender might have changed the taxable result, itself shows that the decision is wrong because there should be no distinction for estate tax purposes between a case where the life insurance con-

tract is surrendered and one where it is not. But it is settled that taxation is controlled by the facts existing at the time of the decedent's death (*Helvering v. Le Gierse*, *supra*, p. 541; *Goldstone v. United States*, 325 U. S. 687, 692-693; *Gwinn v. Commissioner*, 287 U. S. 224, 228-229), and whatever might have been the result if the sons had cashed the insurance contracts here, still they did not do so and in any event they could not have defeated the rights of the decedent under the annuity.

Accordingly, we submit that the ruling of the courts below that the instant transaction was in effect one where the decedent retained a life interest in transferred property is in all respects sound and consistent with all the available authorities. In the circumstances it seems unnecessary to consider our alternative contentions that there was a possibility of reversion sufficient to sustain the tax under *Fidelity Co. v. Rothensies*, 324 U. S. 108, *Commissioner v. Estate of Field*, 324 U. S. 113, and *Goldstone v. United States*, *supra*; and that the insurance contracts and assignments were in fact made in contemplation of death (*United States v. Wells*, 283 U. S. 102; *Allen v. Trust Co.*, 326 U. S. 630). However, these points are not being abandoned, and if certiorari should be granted we would wish to rely upon them as additional grounds upon which to support the decision below.

CONCLUSION

The decision is correct; there is no conflict of decisions; and the petition should be denied.

Respectfully submitted.

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NOVEMBER 1946.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth * * *. (26 U. S. C. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.18. *Transfers with possession or enjoyment retained.*—Except in the case of

a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces (section 811 (c)) all property transferred by the decedent, whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

(1) At any time after 10:30 p. m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

(2) At any time after 5 p. m., eastern standard time, June 6, 1932, and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

A reservation for a "period not ascertainable without reference to his death" may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

The use, possession, right to the income, or other enjoyment of the property will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate.

(See section 81.15.)